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No. 02-954

In The
Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* TERESA EARNHARDT IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37(3)(b), Teresa Earnhardt moves for leave to file the attached brief as *Amicus Curiae* in support of Petitioner, Office of Independent Counsel and Intervenors, Sheila Foster Anthony and Lisa Foster Moody, who are members of Vincent Foster's family. Petitioner and Intervenors have consented to the filing of this brief, but Respondent, Allan Favish, has refused consent, necessitating this motion.[1]

Teresa Earnhardt is the widow of professional racecar driver Dale Earnhardt, who was killed at the Daytona International Speedway during the Daytona 500. In the two years since her husband's death, Teresa Earnhardt has become a national spokesperson for families like hers – families who have lost a loved one in a tragic death, and who then face the unimaginable pain and unwarranted intrusion into their privacy caused by the threatened public release of post-mortem photographs of their loved one's dead body, photographs taken by a governmental agency in the performance of its public duty.

Mrs. Earnhardt's efforts resulted in over two years of litigation in Florida, and prompted legislation in Florida specifically restricting access to autopsy photographs that would otherwise be considered public records. Fla. Stat. § 406.135; *see Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), *rev. denied*,

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[1] Copies of the consent letters received from Petitioner and Intervenors' counsel are submitted with this Motion and *Amicus Curiae* Brief.

(Fla., July 1, 2003) (Table, Case No. SC02-1635). Dale Earnhardt's death became the cataclysmic event through which the public, and the Florida Legislature, came to recognize the need for protection of all families from exploitation by the unconstrained public dissemination of their loved one's autopsy photographs. Few courts have had the opportunity to examine this issue as have Florida courts as a result of the struggle over Dale Earnhardt's autopsy photographs.

Mrs. Earnhardt requests leave to file her brief for two reasons. First, she believes that the circumstances of her case bear directly on the principal issue of this case, which is whether the public inspection, copying and publication of post-mortem photographs (whether death scene or autopsy) "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). While her focus has been on autopsy photographs, which are, as the Florida Legislature found, more grotesque than most death scene photographs in that they involve a pictorial representation of the physical dismembering of the decedent, the unwarranted invasion of personal privacy occurs with the publication and dissemination of both autopsy and death scene photographs. Further, while Mrs. Earnhardt's case arose under Florida's public records law, the detailed evidentiary findings made by Florida courts – and the Florida Legislature – confirm at the state level the analogous analysis made by federal courts under the Freedom of Information Act (the "FOIA"). Florida became one of the first states restricting access to autopsy photographs, and, as discussed in the brief, the trend seems to be to follow the reasoning of the FOIA and the new Florida legislation by balancing the intrusion upon privacy against the public interest in disclosure. Mrs.

Earnhardt believes that the discussion in her brief of the adoption of laws similar to those passed by the Florida Legislature by other states would be of interest to this Court, since death scene and autopsy photographs are far more often created by local and state agencies than by federal agencies. The significance of the state statutes and cases discussed herein is that they provide logical and actual support for the proposition that there can be a balance between the privacy interest and the public's right to know. Thus, although Mrs. Earnhardt's case involves Florida constitutional provisions protecting personal privacy (Article I, Section 23, Florida Constitution) and endorsing inspection and copying of public records (Article I, Section 24, Florida Constitution), the issues involved in balancing those rights under Florida law are similar to the FOIA's Exemption 7(C)'s analysis presented in this case of whether public inspection, copying and publication of post-mortem photographs (including death scene and autopsy photographs) "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Mrs. Earnhardt's second reason for requesting leave to file the attached brief is personal. Mrs. Earnhardt's case arose in today's modern age of high-speed technology and insatiable voyeurism, an age in which the press finds privacy meaningless and nothing sacred. It is an age in which entire internet sites are devoted to the exploitation of death and where gruesome and highly disturbing photographs of autopsies and death scenes can be viewed. Mrs. Earnhardt's interest here is to make sure that other similarly situated families are protected from the unwarranted intrusion upon their privacy that is caused by the

public release of post-mortem photographs under federal or state laws granting public access to records.

Counsel for Mrs. Earnhardt have been involved in her legal struggles over her husband's autopsy photographs as well as the legislation restricting access to such photographs, and also have extensive experience with issues involving the competing interests of public access and individual informational privacy as developed under Florida law. Accordingly, Mrs. Earnhardt (and her counsel) has information, experience and insights that may well be of interest and use to this Court, and which cannot be effectively presented by the parties. For these reasons, Teresa Earnhardt respectfully moves for leave to file the attached brief as *Amicus Curiae*.

Respectfully submitted,

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The question presented is:

Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs relating to the death of former Deputy White House Counsel Vincent Foster.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
BRIEF OF *AMICUS CURIAE* TERESA EARNHARDT IN SUPPORT OF PETITIONER	1
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	9
I. Requiring A Public Interest Nexus For The Release Of Post-Mortem Photographs Under The FOIA Is Consistent With The Good Cause Requirement Imposed By Florida And Other States On The Release Of Autopsy Photographs	9
II. Privacy Under The FOIA: The Public Release Of Post-Mortem Photographs Invades The Privacy Rights Of The Surviving Family, Is Inconsistent With Legislation Adopted By Florida And Others States, And Warrants A Categorical Exemption From The FOIA Disclosure.	15
CONCLUSION	30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Accuracy In Media, Inc. v. National Park Service, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000) 4, 13

Badhwar v. U.S. Dep't of Air Force, 829 F.2d 182 (D.C. Cir. 1987) 20

Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983) 20

Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355 (1997) 18

C.I.A. v. Sims, 471 U.S. 159 (1985) 18

Davis v. U.S. Dep't of Justice, 968 F.2d 1276 (D.C. Cir. 1992) 12

Dep't of Air Force v. Rose, 425 U.S. 352 (1976) 10, 11, 17

Doe v. Attorney General of the U.S., 941 F.2d 780 (9th Cir. 1991) 20

Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996) 20

EPA v. Mink, 410 U.S. 73 (1973) 10

F.B.I. v. Abramson, 456 U.S. 615 (1982) 18

Hale v. U.S. Dep't of Justice, 973 F.2d 894 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993) 20

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) 20

Katz v. National Archives and Records Administration, 68 F.3d 1438 (D.C. Cir. 1995) 19, 20

TABLE OF AUTHORITIES – Continued

Page

N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 29

Neely v. F.B.I., 208 F.3d 461 (4th Cir. 2000) 12

New York Times Co. v. National Aeronautics and Space Administration, 782 F.Supp. 628 (D.D.C. 1991) 19

Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) 21

SafeCard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) 12, 13

Schachter v. Whalen, 581 F.2d 35 (2d Cir. 1978) 20

Schiffer v. F.B.I., 78 F.3d 1405 (9th Cir. 1996) 12

Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574 (D.C. Cir. 1987) 12

Stone v. F.B.I., 727 F.Supp. 662 (D.D.C. 1990), *aff'd*, 1990 WL 134431 (D.C. Cir. 1990) 20

U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) 17, 18, 19

U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) ..... *passim*

U.S. Dep't of State v. Ray, 502 U.S. 164 (1991) 12, 18

U.S. Dep't of State v. Washington Post Co., 456 U.S. 595 (1982) 19

U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) 20

Whalen v. Roe, 429 U.S. 589 (1977) 16, 17, 20

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) 26

Bodelson v. Denver Post Corp., 5 P.3d 373 (Colo. Ct. App. 2000) 24

Campus Communications, Inc. v. Earnhardt, 821 So.2d 388 (Fla. 5th DCA 2002), *rev. denied*, (Fla. July 1, 2003) (Table, Case No. SC02-1635) 15, 27, 28

Com. ex rel. Dist. Attorney of Blair County, 823 A.2d 147 (Pa. Super. Ct. 2003) 25

Earnhardt v. Volusia County, 2001 WL 992068 (Fla. Cir. Ct., July 10, 2001) ..... *passim*

In re T.W., 551 So.2d 1186 (Fla. 1989) 21

Journal/Sentinel, Inc. v. Aagerup, 429 N.W.2d 772 (Wis. Ct. App. 1988) 25

Lincoln County Comm'n v. Nixon, 968 P.2d 1141 (Mont. 1998) 25

Locke v. Hawkes, 1991 WL 231589 (Fla. 1991) 21

Mager v. Dep't of State Police, 595 N.W.2d 142 (Mich. 1999) 24

News-Press and Gazette Co. v. Cathcart, 974 S.W.2d 576 (Mo. App. 1998) 24

North Fla. Women's Health and Counseling Servs., Inc. v. State of Florida, 2003 WL 21546546 (Fla. July 10, 2003) 21

Post-Newsweek Stations, Florida, Inc. v. Does, 612 So.2d 549 (Fla. 1992) 25, 26

TABLE OF AUTHORITIES – Continued

Page

Shuttleworth v. City of Camden, 610 A.2d 903 (N.J. Super. Ct. App. Div. 1992) 24

State ex rel. Dayton Newspapers, Inc. v. Rauch, 465 N.E.2d 458 (Ohio 1984) 25

State v. Nelson, 941 P.2d 441 (Mont. 1997) 25

State of Florida v. Rolling, 1994 WL 722891 (Fla. 8th Cir. Ct., No. 91-3832-CF-A, July 27, 1994) 26, 27

Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984) 21

Univ. of Miami v. Echarte, 618 So.2d 189 (Fla. 1993) 22

Versace v. Office of the State Attorney, Eleventh Judicial Circuit (Dade County), No. 97-29417 (Fla. 11th Cir. Ct., 1998) 27

Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So.2d 544 (Fla. 1985) 21

FEDERAL STATUTES

5 U.S.C. § 552(a)(2) 2

5 U.S.C. § 552(b)(6) 17, 20

5 U.S.C. § 552(b)(7)(C) ..... *passim*

STATE STATUTES

Ala. Code § 36-18-2 (2003) 25

Alaska Stat. § 12.65.020 (2003) 24

Ark. Code Ann. § 12-12-312(a)(1) (2003) 24

Ark. Code Ann. § 14-15-304(a) (2003) 24

Ark. Code Ann. § 25-19-105(b)(6) (2003) 24

TABLE OF AUTHORITIES – Continued

Page

Cal. Civ. Proc. Code § 129 (2003) 24

Colo. Rev. Stat. § 24-72-201 (2002) 24

Colo. Rev. Stat. § 24-72-204 (2002) 24

Conn. Gen. Stat. § 19a-411(b) (2003) 24

Del. Code Ann. tit. 29, § 10002(d)(15) (2002) 24

Fla. Stat. § 119 (2002) 2, 16

Fla. Stat. § 119.07 (2002) 2, 22

Fla. Stat. § 406.135 (2002) 2, 12, 23, 24

Ga. Code Ann. § 45-16-27(d) (2002) 24

Idaho Code § 9-335(1) (2002) 25

Idaho Code § 9-340(4) (2002) 25

5 Ill. Comp. Stat. Ann. 140/7(1)(b) (2002) 24

5 Ill. Comp. Stat. Ann. 140/7(1)(c) (2002) 24

Ind. Code Ann. § 36-2-14-10 (2003) 24

Iowa Code § 22.7(41) (2003) 24

Kan. Stat. Ann. § 22a-233(c) (2002) 25

Kan. Stat. Ann. § 45-216(a) (2002) 25

Ky. Rev. Stat. Ann. § 61.870(1) (2002) 25

Ky. Rev. Stat. Ann. § 61.870(2) (2002) 25

Ky. Rev. Stat. Ann. § 61.872(1) (2002) 25

Ky. Rev. Stat. Ann. § 61.878(1)(a) (2002) 25

Ky. Rev. Stat. Ann. § 61.878(1)(h) (2002) 25

La. Rev. Stat. § 44 (2001) 24

Mass. Gen. Laws Ann. ch. 38, § 2 ¶ 8 (2003) 24

TABLE OF AUTHORITIES – Continued

Page

Md. Regs. Code tit. 10.35.01.14(A) (2003) 24
Me. Rev. Stat. Ann. tit. 22, § 3002(8) (2003).....24
Mich. Comp. Laws § 15.243(1)(b) (2003) 24
Minn. Stat. § 13.83 (2002) 24
Miss. Code Ann. § 41-61-65(1) (2003) 24
Mo. Ann. Stat. § 610.100.2 (2002).....24
Mont. Code Ann. § 1-6-102(3) (2002) 24
N.C. Gen. Stat. § 130A-389(a) (2002) 25
2003 N.D. Laws ch. 384 24
N.H. Rev. Stat. Ann. § 611-A:8(IV) (2002) 24
N.J. Stat. Ann. § 47:1A-1.1 (2003) 24
N.M. Stat. Ann. § 14-2-1.A (2002).....25
N.Y. County Law § 677(3)(b) (McKinney 2003).....24
Neb. Rev. Stat. § 84-712.05(5) (2002) 25
Okla. Stat. tit. 51, § 24A.5(1)(d) (2002) 24
Or. Rev. Stat. § 146.035(5) (2001) 25
R.I. Gen. Laws § 23-3-1(11) (2002) 24
R.I. Gen. Laws § 23-3-23(a) (2002) 24
S.C. Code Ann. § 17-5-535(A) (2002) 24
S.D. Codified Laws § 1-27-1 (2003).....25
S.D. Codified Laws § 23-14-12 (2003).....25
S.D. Codified Laws § 23-6-14 (2003).....25
S.D. Codified Laws § 23-6-17 (2003).....25
Tenn. Code Ann. § 38-7-110(c) (2003) 25

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 38.7-110(d) (2003).....25
Tex. Code Crim. Proc. Ann. art. 49.25(11) (2003).....24
Tex. Gov't Code § 552.101 (2003).....24
Utah Code Ann. § 26-4-17(4) (2003) 24
Va. Code Ann. § 2.2-3705 (2003).....25
Va. Code Ann. § 2.2-3706.G.1 (2003) 25
Vt. Stat. Ann. tit. 1, § 317(c)(2) (2003).....25
Vt. Stat. Ann. tit. 1, § 317(c)(7) (2003).....25
Vt. Stat. Ann. tit. 18, § 5205(f) (2003) 25
W. Va. Code § 61-12-10 (2003) 24
Wash. Rev. Code § 68.50.105 (2003) 24
Wis. Stat. § 19.35(1)(a) (2002) 25
Wyo. Stat. Ann. § 16-4-203(d)(i) (2003).....25

OTHER AUTHORITIES

1982 Op. Atty Gen. 82-12 (Nev., June 15, 1982) 25
1988 Op. Atty Gen. 88-2 (Ky. 1988) 25
1988 Op. Atty Gen. 174 (Ariz., Dec. 30, 1988).....24
1992 Op. Atty Gen. 92-94 (Ky., Feb. 19, 1992) 25
1997 Op. Atty Gen. 97-294 (Ark., Sept. 25, 1997) 24
2001 Op. Atty Gen. 2001-100 (Ark., May 9, 2001) 24
Disclosure of Autopsy Reports, OIP Op. Ltr. 91-32 (Haw., Dec. 31, 1991).....24

TABLE OF AUTHORITIES – Continued

Page

Florida Supreme Court Workgroup on Public Records, *Privacy and Electronic Access To Court Records, Report and Recommendations, at* http://www.flcourts.org/sct/clerk/briefs/2002/601-800/02-659_ petition.pdf 15

Judicial Conference of the United States, *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, at http://www.privacy.uscourts.gov/policy/htm 15

FLORIDA CONSTITUTION

Art. I, § 23, Fla. Const. 3, 21, 22, 25

Art. I, § 24, Fla. Const. 3, 21

Art. I, § 24(a), Fla. Const. 22

Art. I, § 24(c), Fla. Const.....12

BRIEF OF *AMICUS CURIAE* TERESA EARNHARDT IN SUPPORT OF PETITIONER[1]

STATEMENT OF INTEREST

Teresa Earnhardt is a private citizen who files this *Amicus* Brief in support of Petitioner Office of Independent Counsel and the Intervenors who are members of the Vincent Foster family. Mrs. Earnhardt's husband, Dale Earnhardt, was a well-known racecar driver who was tragically killed in February 2001 during the Daytona 500, a major NASCAR race at Daytona International Speedway in Daytona Beach, Florida. An autopsy was performed on Dale Earnhardt, as required by Florida law, resulting in a very detailed autopsy report and thirty-three autopsy photographs. The autopsy report was released to the public. A written evaluation of the autopsy by an independent court-appointed expert was also released to the public. As a result of over two years of litigation and legislation adopted by the Florida Legislature, the autopsy photographs of Mr. Earnhardt have *not* been released to the public.

In the two years since Dale Earnhardt's death, Teresa Earnhardt has become a national spokeswoman for families like hers: families who lose a loved one through a tragedy that triggers the involvement of some governmental agency (whether a medical examiner, sheriff, police department or other law enforcement agency), and then find themselves faced with the task of protecting themselves and their families from the unimaginable pain caused by the public release (including public inspection, public copying, and public republication) of post-mortem photographs of their loved one's dead body taken and collected by that government agency in the performance of its public duty. Mrs. Earnhardt's particular focus has been

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity other than Teresa Earnhardt made a monetary contribution to the preparation and submission of this brief.

on the inspection, copying and republication, by print and electronic press and on the internet, of autopsy photographs created by reason of state laws requiring an autopsy to be performed by a governmental medical examiner to determine cause of death in any unexpected or initially unexplained death.

Mrs. Earnhardt's interest in this case is two-fold. First, although her struggle to prevent the public release of her husband's autopsy photographs arose under state law rather than the Freedom of Information Act (the "FOIA"), she believes that the circumstances of her case bear directly on the principal issue in this case, which is whether the public inspection, copying and publication[2] of post-mortem photographs (whether death scene or autopsy) "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) or "Exemption 7(C)." The State of Florida (widely recognized as the national leader in both ensuring that public records are truly public and in ensuring personal privacy) adopted legislation providing for the balancing of these rights in any public release of autopsy records. By adopting Ch. 2001-1, Laws of Florida (the "Act" codified at Fla. Stat. § 406.135), the State of Florida now requires that the *autopsy report* remain a public record for public inspection and copying, but then also, relying upon legislative findings as to the devastating impact on the survivors resulting from public inspection and copying of the *autopsy photographs* of their decedent, prohibits the inspection and copying of such photographs absent a showing of good cause based upon a four-factor balancing test.[3] The issues involved in balancing these

[2] The Florida statute governing access to public records provides for a request to "inspect and copy" the purported public record. *See* Fla. Stat. § 119.07. The FOIA does likewise ("Each agency, in accordance with published rules, shall make available for public inspection and copying . . . " 5 U.S.C. § 552(a)(2)).

[3] The Act had widespread by-partisan support, and passed by far more than even the 2/3 vote that is now required by virtue of the

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rights are similar to those involving Exemption 7(C). Further, she believes the experience of the various states in the adoption of laws similar to that passed by Florida's Legislature in 2001, would be of interest to this Court, since death scene and autopsy photographs are far more often created by local and state agencies than by federal agencies. The significance of the state statutes and cases discussed herein is that they provide logical and actual support for the proposition that there can be a balance between the privacy interest and the public's right to know. In fact, the circumstances in Florida provide a laboratory in a state that has elevated both the public right to know and the individual privacy right to textual constitutional status.[4]

Teresa Earnhardt's second interest in this case is personal. Mrs. Earnhardt's case arose in today's modern age of high-speed technology and insatiable voyeurism, an age where we have witnessed the evolution of the traditional print/television press to an electronic/internet press with a "no-holds-barred," "worse is better," and "if it bleeds, it leads" mentality. Today, entire internet sites are devoted to the exploitation of death scene photographs, autopsy photographs, crime scenes, and anything else available. Nothing is private, and nothing is sacred. Indeed, unfortunately, Dale Earnhardt's death has become the cataclysmic event through which the public, and the Florida Legislature, came to recognize the need for protection of *all* families from exploitation by the unconstrained

amendment to Article I, Section 24, Fla. Const. approved by the electorate on November 5, 2002. This amendment was proposed by the Florida Legislature, reflecting that body's continuing commitment to "government in the sunshine."

[4] Florida citizens have given both rights constitutional status, endorsing both the protection of personal privacy (Art. I, § 23, Fla. Const.) and the continued accessibility of public records (Art. I, § 24, Fla. Const.).

public dissemination of their loved one's autopsy photographs. Few courts have had the opportunity to examine this issue as have Florida courts as a result of the struggle over Dale Earnhardt's autopsy photographs. Teresa Earnhardt believes that the detailed evidentiary findings of these Florida courts – and the Florida Legislature – confirm at the state level the analogous analysis made by the D.C. Circuit in *Accuracy In Media, Inc. v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000). As the *Earnhardt* trial court determined:

> This case involves a collision of cataclysmic proportion between two extremely valuable rights and their zealous proponents. Modern times have witnessed an erosion of the individual expectation of privacy to a pathetic point. We live in a world in which the individual can anticipate that everything from one's market habits to one's personal health (and everything in-between) are known to anyone with the electronic capacity to eavesdrop. The curiosity of the public combined with the need of the commercial marketers and the media to feed a stated [sic] population with an increasingly sensational daily product have led to a substantially unhealthy environment. Nosiness has become the order of the day – so long as it is amusing or entertaining. Our society has tacitly accepted a standard that permits invasion of privacy of gross dimension, and we have become forgetful of some very basic concepts. Foremost among them is the simple notion that many things are nobody else's business. We are entitled to be let alone; to have our private space – a space that is not subject to invasion by the uninvited.

Earnhardt v. Volusia County, 2001 WL 992068, *5 (Fla. Cir. Ct., July 10, 2001) (No. 2001-20773-CICI).

After examining the evidence, the *Earnhardt* trial court determined that "release of the autopsy photographs to any members of the public could result in immediate,

widespread dissemination of these disturbing images, including posting on the world wide web." *Id.* at *3. The court also took judicial notice of the many web sites already specializing in the publication of photographs that are "without question gruesome, grisly, and highly disturbing to a person of ordinary and normal sensibilities." *Id.* at *2.

> There are numerous web sites, which specialize in posting gruesome, grisly and disturbing images of dead or severely injured persons, as well as autopsy photographs. Some of these websites are findadeath.com, choosedeath.com, and websitecity.com. It is a virtual certainty that these particular autopsy photographs would be posted on one or more of these web sites for immediate, worldwide viewing if they became publicly available.

Id. at *3.[5]

Teresa Earnhardt was not the first person to find herself in this situation. Indeed, the *Earnhardt* trial court accepted testimony of relatives of two deceased racecar drivers whose autopsy photographs had already been posted on the web.[6] It became clear from the testimony of

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[5] *See, e.g.*, http://www.earnhardtinvestigation.com; http://www.// death gallery. com; http://www.lisamcpherson.org. lisapics.htm; http://www.bobaugust.com/photos.htm (crime scene photographs of Simpson and Goldman murders); http://www.findadeath.com (*see e.g.*, Jeffrey Dahmer page); and http://www.everwonder.com/david/worldofdeath.

[6] The trial court also heard testimony from the relatives of Neil Bonnett and Rodney Orr, the deceased racecar drivers whose autopsy photographs were posted by Intervenor Uribe on his website. Ms. Kristen Bonnett testified about the extreme emotional distress she felt when she viewed Uribe's website and saw 48 autopsy photographs of her father "on the table, butt [sic] naked, gutted like a deer . . . staring me directly in the face." *See Earnhardt v. Volusia County*, trial testimony of Kristen Bonnett. Mr. Beacher Orr, who did not view his son's autopsy photographs, testified about how he "went all to pieces" upon learning that they were published on Uribe's website. *Id.*, trial testimony of Beacher Orr. The thought of people viewing pictures of Rodney

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the victims' families that merely prohibiting *copying* of their loved one's autopsy photographs did not prevent this "unwarranted intrusion" upon their privacy. So long as public *inspection* is permitted in any form, there is unwarranted intrusion upon privacy, with its resulting pain; indeed, it matters only in degree whether the inspection occurs one-by-one at the medical examiner's office, or by millions of people viewing the photographs on the internet. It is the *disclosure* of these highly private and personal photographs in any way (whether by inspection only or by copying), and the *knowledge* of that disclosure, that result in the unwarranted intrusion. Based on this testimony, the *Earndhardt* trial court found:

> The intervener, Mr. Uribe, has already published autopsy photographs of Neil Bonnett and Rodney Orr, two racecar drivers who died in accidents at the Daytona International Speedway, on his web site, websitecity.com. Relatives of those decedents testified in the present proceeding. The court recognizes that not only the publication of their loved ones' autopsy photographs on the internet, but also the knowledge that these photographs are available to the public for unnecessary perusal caused overwhelming personal distress and trauma to them and their families. It was clear from their testimony, and the testimony of Teresa Earnhardt, that it is the unnecessary inspection itself – not necessarily the frequency with which it occurs – that constitutes the gravamen of the injury to a family. The witnesses in this case were obviously shocked by the use of the World Wide Web, but they also felt significantly invaded by unnecessary inspection on a more limited scale. The character of this particular injury is such that unwarranted invasions of the

"laying on the table there, naked and bleeding," has caused him insomnia. *Id.*

> family's privacy, regardless of the frequency, leave a scar.

Id. at *3. The *Earnhardt* trial court further determined that:

> The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents, and spouse. The wide viewing of such personal and painful photographs by people all over the world who are strangers to the family will cause serious pain, anxiety, worry, and discomfort to the family members. The availability of such photographs on the web makes the dissemination of the photographs very easy for anyone with access to a computer modem. That knowledge alone would cause continuous pain and anxiety to the family and prolong their suffering. The court specifically finds that examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members.

Id.

Teresa Earnhardt's interest here is in making sure that no "other family in America go[es] through what we're going through." *See* Statement of Teresa Earnhardt, March 4, 2001, http://www.orlandosentinel.com/sports/motorracing/orl-spt-teresastatement0304,0,1008732.story. Even though Dale Earnhardt's autopsy photographs have been sealed by a court, Teresa Earnhardt recognized:

> [T]here's a larger issue here. As our family has learned, the laws differ from state-to-state concerning accessibility to autopsy photos. The deceased have a right to their dignity and loved ones have a right to be free from exploitation. . . . Our family knows that what is happening to us is wrong and we don't want any other family in

> America to go through what we're going through . . . This is the first time I've spoken in public since we've lost Dale. Honestly, I'm not very comfortable being here. It's too soon. But this issue is of vital importance – not just to my family – but to anyone ever faced with being exploited after losing a loved one.

Id.

The many parallels between the *Earnhardt* case, at the state level, and this case, at the federal level, may well be of use to this Court as it weighs the public's right to records of governmental agencies against the family's privacy interest in avoiding disclosure of highly personal post-mortem photographs collected by governmental agencies in the performance of their duties.

SUMMARY OF THE ARGUMENT

Both the FOIA and most state laws balance specific public interests in the disclosure of information against intrusions into personal privacy. The courts have placed a substantial burden on parties seeking disclosure of personal materials to show strong public necessity for the disclosure. At the same time, courts recognize that one's private interest in keeping matters private is increased when dealing with photographs, particularly post-mortem photographs. To analogize the holding in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989), the privacy interest in protecting personal post-mortem photographs is at the apex of privacy interests, while public interest in disclosure of such photographs is at its nadir. Consequently, in any balancing of these interests, the "disparity on the scales of justice" supports a categorical exemption, absent compelling circumstances. This Court in *Reporters Comm.* balanced competing interests and applied that balance to an entire category of records – rap sheets. Post-mortem photographs warrant the same categorical analysis. Logically, families of decedents subject to disclosure of post-mortem photographs should have equal or greater

protection than criminals as to disclosure of their rap sheets.

ARGUMENT

I. Requiring A Public Interest Nexus For The Release Of Post-Mortem Photographs Under The FOIA Is Consistent With The Good Cause Requirement Imposed By Florida And Other States On The Release Of Autopsy Photographs.

This Court has recognized that the policies adopted by states with respect to the interrelationship between the privacy interests of subject individuals and the societal interest in the public availability of documents collected or created by the government are relevant to determinations made under the FOIA:

> State policies, of course, do not determine the meaning of a federal statute, but they provide evidence that the law enforcement profession generally assumes – as has the Department of Justice – that individual subjects have a significant privacy interest in their criminal histories. It is reasonable to presume that Congress legislated with an understanding of this professional point of view.

Reporters Comm., 489 U.S. at 767. To be sure, the state policy to which the Earnhardt family has directed attention deals with whether, and to what extent, autopsy photographs, created by government for a defined regulatory purpose (medical examiner determination of cause of death), should be exposed to public view and republication by reason of Florida's counterpart to the FOIA. The other states that have adopted statutes similar to that of Florida have also generally been directed at autopsy photographs. Although the photographs here involved may not technically be autopsy photographs, but rather death scene photographs, they are also created by government for a defined regulatory purpose (law enforcement investigation as to cause and circumstances of death). Further, we

believe the tension between the interest of the private subject – the members of the family of an individual killed in a violent tragic death – in preventing public view or replication of photographs of the deceased person so as to maintain their private memories of that individual against the potential assaults on their sensibilities by an increasingly intrusive and invasive press – is similar to that involved in the weighing of interests considered in determining whether disclosure of a governmental document under Exemption 7(C) is appropriate. Autopsy photographs are, as the Florida Legislature found, more grotesque than most death scene photographs, in that they involve a pictorial representation of the physical dismembering of the decedent. However, an unwarranted invasion of personal privacy may occur in either instance, the autopsy photograph or the death scene photograph.

So also, the nature of the governmental interest in disclosure, highlighted in the Florida and other states' statutes, may be relevant to that articulated in case law interpretations of the FOIA. Like the public records laws of most states, the FOIA was "designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose,* 425 U.S. 352, 361 (1976). As this Court has observed:

> Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested documents and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S. at 372, rather than on a particular purpose for which the document is being requested. In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." *EPA v. Mink*, 410 U.S. 73, 80 (1973).

Reporters Comm., 489 U.S. at 772.

> FN20. Cf . . . Kronman, The Privacy Exemption to the Freedom of Information Act, 9 J. Legal Studies 727, 733 (1980) ("The act's first and most obvious goal (reflected in its basic disclosure requirements) is to promote honesty and reduce waste in government by exposing official conduct to public scrutiny"); . . .

Id. at fn. 20.

> This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose,* 425 U.S., at 360-361, 96 S.Ct., at 1599 (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about 'what their government is up to.'" . . . That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct . . . Indeed, response to this request would not shed light on the conduct of any Government agency or official.

Id. at 773.

The purpose of the FOIA, like the purpose of state public records laws, is to foster governmental openness and accountability, not to disclose information about private citizens. Thus, release of information about private citizens under the FOIA is properly conditioned upon an assessment that the release of such information serves the public interest in evaluating governmental performance:

> Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as

> no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

Reporters Comm., 489 U.S. at 774-75.

Assessment of the public interest in the disclosure of the post-mortem photographs at issue here is guided by three established principles: First, there is a "nexus" requirement – i.e., the public interest must be assessed in relationship to the requested photographs. *See Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987). Second, the public interest in disclosure must be viewed in light of the information that has already been disclosed to the public. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (denying disclosure where public interest has been adequately served by disclosure of the redacted interview summaries). Third, there must be evidence of government wrongdoing or misconduct. *See Schiffer v. F.B.I.*, 78 F.3d 1405, 1410 (9th Cir. 1996); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992); *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991); *Neely v. F.B.I.*, 208 F.3d 461, 464 (4th Cir. 2000).

Similar to the judicial pronouncements of this Court and other federal courts, the Florida Legislature has provided for disclosure of autopsy photographs on a showing of "good cause" for their production, with that "good cause" to be predicated on 1) whether disclosure is necessary so that the public can evaluate the government's performance; 2) the seriousness of the intrusion into the family's right to privacy; 3) whether disclosure is the least intrusive method available; and 4) the availability of similar information in other public records regardless of form. Fla. Stat., § 406.135(2)(a) (2001).[7]

[7] Article I, Section 24(c), Fla. Const. permits the Legislature to create exemptions to Florida's Public Records Law if two conditions are met: the law states with specificity the public necessity justifying the

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The first of these predicates is virtually identical to the pronouncements of this Court as to the FOIA (that is, whether disclosure is necessary for the evaluation of the government's performance), and is always the critical prerequisite. Thus, in *Accuracy in Media*, the D.C. Circuit properly held that AIM had to show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence." 194 F.3d at 124, quoting *SafeCard*, 926 F.2d at 1205-06. Similarly, at the state level, in the *Earnhardt* case, the trial court noted that significant information had already been made publicly available about Mr. Earnhardt's death, including a very detailed autopsy report and the report of an independent court-appointed expert. The press raised no question as to the competency of the medical examiner or his report. Indeed, the press' only asserted reason for wanting the photographs was to evaluate the safety of NASCAR racing. The press failed to suggest any reason that copying the autopsy photographs would be helpful "in any degree whatsoever" in evaluating the performance or accountability of government. *Earnhardt v. Volusia County*, 2001 WL 992068 at *3. The trial court further found that there were no allegations of government impropriety. Specifically, there were no allegations that the medical examiner did not perform a proper autopsy, and no challenge to his conclusion that Dale Earnhardt died as a result of a skull fracture.

The trial court further determined that the press' arguments relating to NASCAR racing safety, while potentially raising a number of *private* interests, did *not* implicate a governmental interest. *Id.* In fact, according to the trial court, these arguments "were thinly veiled excuses to gain access to the court either for the purpose of arguing the constitutionality of the statute or for making a

exemption, and the exemption is no broader than necessary to accomplish the stated purpose of the law.

profit at the expense of [the Earnhardt] family. They are strained arguments and are entirely too tenuous for realistic discussion." *Id.* The *Earnhardt* trial court found that in the absence of some question raised as to the performance by the medical examiner of his public duties or some other evaluation of governmental performance, the privacy interest of the Earnhardt family in the autopsy photographs remaining out of public view was controlling.

In affirming the *Earnhardt* trial court, the Fifth District Court of Appeal of Florida found the absence of any issue regarding governmental performance and the failure to show how release of the autopsy photographs would promote the public interest was thus fatal:

> As to the first factor, while the public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion, that interest cannot be served by viewing the autopsy photographs of Mr. Earnhardt because the uncontradicted testimony establishes that the photographs are not of diagnostic quality. Moreover, the testimony further established that there is nothing that can be discerned from the photographs that is not contained in the autopsy report and other materials that have been released to Campus and the public. If it cannot be determined from the photographs that the cause of death was anything other than what the medical examiner concluded, the photographs will not aid in assuring that the government is performing up to the required standard. Regarding the argument advanced by Campus that the photographs are needed to evaluate NASCAR safety requirements, the trial court found, and we agree, that the safety requirements of NASCAR, a private entity, do not implicate the public interest in evaluating governmental performance sufficient to release the photographs.

Campus Communications, Inc. v. Earnhardt, 821 So.2d 388, 402 (Fla. 5th DCA 2002), *rev. denied*, (Fla. July 1, 2003) (Table, Case No. SC02-1635).

II. Privacy Under The FOIA: The Public Release Of Post-Mortem Photographs Invades The Privacy Rights Of The Surviving Family, Is Inconsistent With Legislation Adopted By Florida And Others States, And Warrants A Categorical Exemption From The FOIA Disclosure.

Increasingly, legislatures and courts (both state and federal) have been forced to deal with issues involving the public disclosure of private information about private citizens collected by governmental agencies in the performance of their duties.[8] Informational privacy has become increasingly important in light of the increased availability of information about an individual that in simpler times would have been considered highly personal. Exacerbating the amount of information available about any given person is the increased accessibility to computers capable of collecting and collating such information into massive databases. Although it would perhaps be better to restrict the information that is collected about an individual, as a practical matter to date, this has proved impossible. Further, as in the case of autopsy photographs, there is often a very legitimate reason to collect, that is

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[8] Even courts are increasingly concerned about the amount of sensitive information about individuals filed with courts and then widely publicly disseminated. *See* the Florida Supreme Court Workgroup on Public Records, *Privacy and Electronic Access To Court Records, Report and Recommendations*, at http://www.flcourts.org/sct/clerk/briefs/2002/601-800/02-659_petition.pdf, at 27-31 (Nov. 15, 2001); *see also*, Judicial Conference of the United States, *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, at http://www.privacy.uscourts.gov/policy/htm.

"create" the information. For both these reasons, there will be an increasing effort to restrict the dissemination of information already collected by governmental agencies.[9]

While the *Earnhardt* case is not a FOIA case, the federal FOIA and its exceptions are the federal analogues to Florida's Public Records Act (Fla. Stat. § 119) and the Family Protection Act. Both the FOIA exceptions and the Florida statute are designed to protect the privacy rights of both decedents and their families.

In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court acknowledged an individual's constitutionally protected right to information privacy, or the "individual's [privacy] interest in avoiding disclosure of personal matters." *Id.* at 599. As this Court observed:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.

Id. at 605. Although rejecting the privacy arguments made by patients and doctors about the New York statute requiring entry of patient names, addresses and doctors in a centralized computerized database, the Court did so on

[9] Congress has been increasingly sensitive to and protective of this need to keep private information about private citizens from public disclosure. *See, i.e.*, Consumer Privacy Section Act of 2003, H.R. 1636 108th Cong. (2003); Privacy Act of 2003, S. 745, 108th Cong. (2003); the Telemarketing Intrusive Practices Act of 2001, S. 1881, 107th Cong. (2001); Privacy Commission Act, H.R. 583, 107th Cong. (2001); the Confidential Information Privacy Act, H.R. 2136, 107th Cong. (2001); and the Student Privacy Protection Act, S. 290, 107th Cong. (2001).

two grounds: (a) that the state had taken security precautions to ensure the database information would not be unintentionally disclosed or made publicly available; and (b) the state had shown an important interest in tracking the use of certain legal, yet dangerous, drugs. *Id.* at 600-02.

This notion of constitutionally protected informational privacy has been adopted in the areas of statutory and regulatory protection of private information collected by governmental agencies in the performance of its duties, creating a statutory privacy interest under FOIA. Since 1976, this Court has considered several cases involving the FOIA demands for records containing information about private individuals.[10]

In the first such case, the Court established a balancing test for deciding challenges to requests for government records by weighing the democratic value of access to the information against the individual value of privacy. *Dep't of Air Force*, 425 U.S. at 352. This Court held that when a privacy challenge seeks to block disclosure under the FOIA, the balancing test between the individual value of personal privacy against the societal value of public disclosure should be the device to determine whether a record should be released. Applying this balancing test, the Court upheld a FOIA request by law review editors for summaries of honor and ethics violations at the U.S. Air Force Academy, holding that although the records would

[10] Exemption 6 prohibits disclosure of records pertaining to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Exemption 7 privacy section states that the FOIA does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) is more protective of privacy than Exemption 6. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496, n.6 (1994).

be disclosed, the names of the cadets would be redacted first.

Over the next two decades, this Court has heard several other FOIA privacy cases involving the FOIA Exemptions 6 and/or 7, and in all such cases has upheld the agency's decision to withhold records on a privacy basis. It is significant that in no case construing the FOIA has this Court found it appropriate to order a governmental agency to honor a FOIA request for information about a particular private citizen. *See Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (rejecting on privacy grounds an environmental group's FOIA request for contact information of individuals who received a Bureau of Land Management newsletter about the future of the Oregon High Desert); *U.S. Dep't of Defense*, 510 U.S. 487 (rejecting as a clearly unwarranted invasion of personal privacy a FOIA request by unions for home addresses of federal employees for the purpose of contacting them about union membership); *U.S. Dep't of State v. Ray*, 502 U.S. at 178 (holding that disclosure to an attorney of unredacted address information to assist Haitian immigrants who unsuccessfully sought political asylum in the United States was not warranted under the FOIA because the "public interest has been adequately served by disclosure of the redacted interview summaries and that disclosure of the unredacted documents would therefore constitute a clearly unwarranted invasion of the interviewees' privacy."); *Reporters Comm.*, 489 U.S. 749 (rejecting a journalist's FOIA request for an FBI rap sheet of a reputed crime figure suspected of bribing a congressman to obtain a federal contract on grounds that releasing the information would be an invasion of privacy because the rap sheet would not shed any light on official agency operations or activities); *C.I.A. v. Sims*, 471 U.S. 159 (1985); *F.B.I. v. Abramson*, 456 U.S. 615 (1982) (rejecting a journalist's FOIA request for FBI report requested by President Nixon, who ordered FBI background checks on his political enemies, on grounds that information originally compiled for law enforcement purposes does not lose its privacy exemption status merely because the information is reproduced in a new document that is not for law enforcement purposes); *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982) (rejecting a FOIA request by the Washington Post for passport application information on two Iranian nationals who traveled under the protection of United States passports during a period of strained relations between Iran and the United States).

Federal courts have consistently held that the protection afforded to medical data also encompassed post-mortem photographs and other highly personal records.[11] For example, in *New York Times Co. v. National Aeronautics and Space Administration*, 782 F.Supp. 628, 631-32 (D.D.C. 1991), the court held that the privacy rights of the family members of the Challenger astronauts outweighed public interest in hearing audio tapes of the crew's last words, and thus prohibited release of these tapes under the FOIA. Four years later the D.C. Circuit blocked the disclosure of autopsy photographs and held that their disclosure implicates the privacy rights of both the decedent and his family. *Katz v. National Archives and Records Administration*, 68 F.3d 1438 (D.C. Cir. 1995) (holding the autopsy photographs of former President John F. Kennedy could not be released to the public because they had been given to the Kennedy estate, and were thus not government records subject to disclosure, but also noting that even if the photographs were government records, they would remain exempt from disclosure under a FOIA exception for medical records. "The x-rays and [autopsy] photographs are

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[11] In applying Exemption 7(C) to post-mortem photographs, a court must weigh the privacy interest of the deceased's family in keeping the photographs closed to public viewing "against the only relevant public interest in the FOIA balancing analysis – the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dep't of Defense*, 510 U.S. at 497, citing *Reporters Comm.*, 489 U.S. at 773 (internal quotation marks omitted; emphasis deleted).

medical records," the court held, "which are usually considered private. *See, e.g.*, 5 U.S.C. § 552(b)(6) (exempting 'medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' from disclosure under the FOIA.") *Id.* at 1441); *see also*, *Badhwar v. U.S. Dep't of Air Force*, 829 F.2d 182, 185-86 (D.C. Cir. 1987) (concluding under the FOIA standard that release of autopsy photographs of deceased pilots would "shock the sensibilities of surviving kin" and was a "clearly unwarranted invasion of personal privacy" of the families); *Stone v. F.B.I.*, 727 F.Supp. 662 (D.D.C. 1990), *aff'd*, 1990 WL 134431 (D.C. Cir. 1990) (withholding of the names of FBI and local law enforcement agents that participated in the investigation of the assassination of Senator Robert F. Kennedy); *see also*, *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993) (holding that Exemption 7(C) prevented the disclosure of photographs of a deceased victim as no public interest could be discerned that would outweigh the personal privacy interest of a victim's family).

The importance of this privacy interest has expanded to the point that at least one federal circuit has held that one's individual privacy interest may override even a state's open records law. Thus, the Sixth Circuit relying upon *Whalen*, recently held that the individual right to nondisclosure of private information means that private information in governmental records may be withheld despite the fact that the record is otherwise disclosable under a state open records law. *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).[12]

[12] Other circuits have likewise recognized this informational privacy interest. *See, i.e., Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); *Doe v. Attorney General of the U.S.*, 941 F.2d 780 (9th Cir. 1991); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980); *Schachter*

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Use of this federal balancing test can be found in Florida and other state courts as well. Indeed, state courts and legislatures regularly recognize the value of public disclosure by weighing the right of public access against the individual's right to privacy. Although access to public records has enjoyed a long history in Florida and has been recognized as highly significant, *see Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984), until adoption of Article I, Section 24 in 1992, any rights to records were solely based on statutory law.[13] The Legislature proposed, and the people of Florida adopted, Article I, Section 24 to secure and define the right of access to public records. The same provision also includes the appropriate standard of review for any new exemptions: that these be explicitly based on a finding of public necessity and that they be no broader than necessary. Florida has thus led the nation in open government – that is, government in the sunshine.

Florida has also led the nation in recognizing privacy rights, and the potential tension between privacy interests and government in the sunshine. Florida's privacy amendment was adopted in 1980.[14] Instead of requiring a showing of a compelling state interest to overcome the privacy right, Florida courts use a balancing test because the language in Section 23 provides that "[t]his section shall not be construed to limit the public's right of access

v. Whalen, 581 F.2d 35 (2d Cir. 1978); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

[13] This amendment was prompted by a decision by the Florida Supreme Court that found the Florida public records law did not apply to many executive, legislative, or judicial officers. *See Locke v. Hawkes*, 1991 WL 231589 (Fla. 1991). The controversial decision was later withdrawn.

[14] Florida's explicit constitutional right to privacy is broader, and provides more substantial protection than does the comparable federal right. *See In re T.W.*, 551 So.2d 1186, 1198 (Fla. 1989); *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So.2d 544, 548 (Fla. 1985); *North Fla. Women's Health and Counseling Servs., Inc. v. State of Florida*, 2003 WL 21546546 (Fla. July 10, 2003).

to public records and meetings as provided by law." Art. I, § 23, Fla. Const.

Faced with these two competing constitutional interests, the Florida Legislature became one of the first state legislatures to adopt legislation granting a limited, categorical exemption from the state's public records laws for autopsy photographs.[15] In doing so, the Legislature cited comprehensive legislative findings as to the purpose for the limited exemption it was creating:

> The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(a), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio records of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio records may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased.

2001 Fla. Laws, ch. 2001-1, § 2.[16]

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[15] As a practical matter, there is little alternative. Once autopsy photographs are released, an after-the-fact tort damages award (even if it exists) is worth nothing, and does not compensate for the unwarranted invasion of personal privacy.

[16] Such legislative findings, set forth in Section 2 of Chapter 2001-1, are presumptively correct and are entitled to great deference under Florida law. *See Univ. of Miami v. Echarte*, 618 So.2d 189, 196 (Fla. 1993).

The Florida Legislature specifically expressed its concern about the worldwide web and the potential for widespread dissemination of autopsy photographs:

> The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Id.

The Act exempts from immediate public records disclosure the photographs, videotapes and recordings of an autopsy, but permits such disclosure if a court finds good cause. The right to immediate disclosure remains with a surviving spouse and certain delineated family members, and governmental agencies in furtherance of their official duties. Fla. Stat. § 406.135(1).

While Florida has led the nation in enacting this legislation, it is certainly not the only state to have recognized the need for specific laws restricting access to autopsy photographs that would otherwise be available under state public records laws. Most states now restrict public access to autopsy photographs. In fact, in the last several years, the trend seems to be to follow the reasoning of the FOIA and the new Florida statute, by balancing intrusion upon privacy against the public interest in disclosure. Twenty-four states (Alaska, California, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa,

Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Washington and West Virginia) currently have adopted specific laws making autopsy photographs or autopsy reports confidential.[17] Nineteen states (Arizona, Arkansas, Colorado, Hawaii, Illinois, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia and Wisconsin) have limited access to autopsy records either by statute or case law.[18] Only seven states have no restrictions on public

[17] *See* Alaska Stat. § 12.65.020 (2003); Cal. Civ. Proc. Code § 129 (2003); Conn. Gen. Stat. § 19a-411(b) (2003); Del. Code Ann. tit. 29, § 10002(d)(15) (2002); Fla. Stat. § 406.135 (2002); Ga. Code Ann. § 45-16-27(d) (2002); Ind. Code Ann. § 36-2-14-10 (2003); Iowa Code § 22.7(41) (2003); 2001 La. Acts 117, effective August 15, 2001, created La. Rev. Stat. § 44 (2001); Me. Rev. Stat. Ann. tit. 22, § 3002(8) (2003); Md. Regs. Code tit. 10.35.01.14(A) (2003); Mass. Gen. Laws Ann. ch. 38, § 2 ¶ 8 (2003); Minn. Stat. § 13.83 (2002); N.H. Rev. Stat. Ann. § 611-A:8(IV) (2002); N.J. Stat. Ann. § 47:1A-1.1 (2003); *Shuttleworth v. City of Camden*, 610 A.2d 903, 914-15 (N.J. Super. Ct. App. Div. 1992); N.Y. County Law § 677(3)(b) (McKinney 2003); 2003 N.D. Laws ch. 384; Okla. Stat. tit. 51, § 24A.5(1)(d) (2002); R.I. Gen. Laws § 23-3-1(11) (2002); R.I. Gen. Laws § 23-3-23(a) (2002); R.I. Code R. 814.1 and 814.2 (2002); S.C. Code Ann. § 17-5-535(A) (2002); Tex. Gov't Code § 552.101 (2003); Tex. Code Crim. Proc. Ann. art. 49.25(11) (2003); Utah Code Ann. § 26-4-17(4) (2003); Wash. Rev. Code § 68.50.105 (2003); W. Va. Code § 61-12-10 (2003). (*See* attached Appendix for a description of these various state laws).

[18] *See* 1988 Op. Atty Gen. 174 (Ariz., Dec. 30, 1988); Ark. Code Ann. § 14-15-304(a) (2003); Ark. Code Ann. § 12-12-312(a)(1) (2003); Ark. Code Ann. § 25-19-105(b)(6) (2003); 2001 Op. Atty Gen. 2001-100 (Ark., May 9, 2001); 1997 Op. Atty Gen. 97-294 (Ark., Sept. 25, 1997); Colo. Rev. Stat. § 24-72-201 (2002); Colo. Rev. Stat. § 24-72-204(6)(a) (2002); *Bodelson v. Denver Post Corp.*, 5 P.3d 373, 378-79 (Colo. Ct. App. 2000); *Disclosure of Autopsy Reports*, OIP Op. Ltr. 91-32 (Haw., Dec. 31, 1991); 5 Ill. Comp. Stat. Ann. 140/7(1)(b) (2002); 5 Ill. Comp. Stat. Ann. 140/7(1)(c) (2002); *Mager v. Dep't of State Police*, 595 N.W.2d 142, 146 (Mich. 1999); Mich. Comp. Laws § 15.243(1)(b) (2003); Miss. Code Ann. § 41-61-65(1) (2003); Mo. Ann. Stat. § 610.100.2 (2002); *News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576, 579-80 (Mo. App. 1998); Mont.

(Continued on following page)

access to autopsy records and photographs (Alabama, Idaho, Kansas, Kentucky, New Mexico, North Carolina and Wyoming); however, legislation to exempt the disclosure of autopsy photographs has been initiated in two of these states (Kentucky and North Carolina).[19]

Florida's categorical exemption from its open records law for autopsy photographs (absent a showing of good cause) is based on well-established Florida constitutional law providing extraordinary and specific protection for situations such as these, where potential public release of sensitive information would cause severe and unwarranted interference with the informational right of privacy arising under Article I, Section 23, Fla. Const. and the Fourteenth Amendment to the U.S. Constitution. *Post-Newsweek Stations, Florida, Inc. v. Does*, 612 So.2d 549

Code Ann. § 1-6-102(3) (2002); *Lincoln County Comm'n v. Nixon*, 968 P.2d 1141 (Mont. 1998); *State v. Nelson*, 941 P.2d 441, 446-47 (Mont. 1997); Neb. Rev. Stat. § 84-712.05(5) (2002); 1982 Op. Atty Gen. 82-12 (Nev., June 15, 1982); *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 465 N.E.2d 458, 459-60 (Ohio 1984); Or. Rev. Stat. § 146.035(5) (2001); *Com. ex rel. Dist. Attorney of Blair County*, 823 A.2d 147 (Pa. Super. Ct. 2003); S.D. Codified Laws § 1-27-1 (2003); S.D. Codified Laws § 23-14-12 (2003); S.D. Codified Laws §§ 23-6-14 and 23-6-17 (2003); Tenn. Code Ann. § 38-7-110(c) (2003); Tenn. Code Ann. § 38.7-110(d) (2003); Vt. Stat. Ann. tit. 1, § 317(c)(2) or (c)(7) (2003); Vt. Stat. Ann. tit. 18, § 5205(f) (2003); Va. Code Ann. §§ 2.2-3705 and 2.2-3706.G.1 (2003); Wis. Stat. § 19.35(1)(a) (2002); *Journal/Sentinel, Inc. v. Aagerup*, 429 N.W.2d 772, 774-75 (Wis. Ct. App. 1988). (*See* attached Appendix for a description of these various state laws).

[19] *See* Ala. Code § 36-18-2 (2002); Idaho Code § 9-335(1) (2002); Idaho Code § 9-340(4) (2002); Kan. Stat. Ann. § 22a-233(c) (2002); Kan. Stat. Ann. § 45-216(a) (2002); Ky. Rev. Stat. Ann. § 61.872(1) (2002); Ky. Rev. Stat. Ann. § 61.870(1) and (2) (2002); Ky. Rev. Stat. Ann. § 61.878(1)(h) (2002); Ky. Rev. Stat. Ann. § 61.878(1)(a) (2002); Opinion Atty. Gen. 92-94 (Ky., Feb. 19, 1992); 88-2 (Ky. 1988); N.M. Stat. Ann. § 14-2-1.A (2002); N.C. Gen. Stat. § 130A-389(a) (2002); Wyo. Stat. Ann. § 16-4-203(d)(i) (2003). (*See* attached Appendix for a description of these various state laws).

(Fla. 1992) ("*Does*"); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988).[20]

The four-part test adopted by the Florida Legislature is based on the test first used in *State of Florida v. Rolling*, 1994 WL 722891 (Fla. 8th Cir. Ct., No. 91-3832-CF-A, July 27, 1994), which involved the trial of a serial murderer of students at the University of Florida, and at which trial the autopsy and death scene photographs of the deceased students were to be introduced. The public interest in governmental accountability and justice weighed very heavily in favor of permitting full courtroom accessibility to the press in this highly publicized criminal murder trial. However, in a somewhat kinder, gentler day, the trial judge, the parties, and the media agreed to a four-part test for inspecting, but not copying, the trial photographs, so as to protect both whatever disclosure might be necessary for the public evaluation of governmental performance while protecting the seriousness of the intrusion into the right of privacy of the families of the murdered victims.[21] The issue

[20] The Florida Supreme Court's decision in *Does*, specifically acknowledged this right to informational privacy. The records involved included the names and addresses of John Does (the "johns") plus "sexual notations regarding . . . customers" and "intimate information relating to genital size and sexual performance." *Id.* at 549. The court held that it must "qualify the public's statutory right of access . . . by balancing it against the Does' constitutional right to privacy", and specifically applied the balancing standards set forth in *Barron*. *Id.* at 551-52. The court *rejected* the media's argument that there should be no such balancing. The court noted the various private types of information subject to non-disclosure and, while concluding names and addresses of persons participating in the crime of prostitution were disclosable, it nonetheless made clear that the intimate sexual information was both *not* at issue and was different ("we note that the details of an individual's life dealing with noncriminal intimate associations fall within a protected zone of privacy" (*id.* at 552, n.3)). In *Barron* and *Does*, the Florida Supreme Court stated that the constitutional privacy rights of innocent third parties were appropriate grounds for restricting access to records otherwise public.

[21] The court recognized that post-mortem photographs of murder victims at the scene of the crime and during their autopsy were

(Continued on following page)

was next posed in *Versace v. Office of the State Attorney, Eleventh Judicial Circuit (Dade County)*, No. 97-29417 (Fla. 11th Cir. Ct., 1998), where the court, at the request of the family of murdered Gianni Versace, prohibited inspection and copying of Mr. Versace's autopsy photographs after the widely celebrated manhunt for his murderer, Andrew Cunanen, was concluded by Cunanen's suicide.

With this well-established legal background, three years later the *Earnhardt* trial court was able to apply the four-part test adopted by the Act in the context of Florida's privacy interest, and ruled in favor of nondisclosure. In affirming that decision, the Fifth District Court of Appeal of Florida stated:

> The second factor weighs very heavily in favour of nondisclosure. The medical examiner testified that the photographs were "gruesome, grisly and highly disturbing," and the physician attending Mr. Earnhardt after the accident confirmed this. The trial court found that such publication would "be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members." It is evident from our review of the record that the publication of the nude and dissected body of Mr. Earnhardt would cause his

"intimate and potentially embarrassing photographs of the mutilated bodies" and that "[c]ommon sense and experience dictate that no reasonable person could expect [the families] to face these images in a public forum without great emotional distress and trauma." *Rolling*, 1994 WL 722891, *4. The court noted that "[t]he content of the subject matter – the photographs of the nude bodies, the stab wounds and mutilations of the victims – can reasonably be expected to cause extreme emotional distress and trauma if encountered in supermarket tabloids, newspapers, magazines, television programs or the like . . . " *Id.* Inspection (but not copying) was permitted because there the trial court was dealing with trial exhibits, the nature of which could affect the appropriateness of imposing the death penalty.

> wife and children pain and sorrow beyond the poor power of our ability to express in words.

Campus Communications v. Earnhardt, 821 So.2d at 402. The court found there was no less intrusive means available for preventing trauma to the Earnhardt family, finding that the "mere knowledge that the photographs would be accessible for inspection was the cause of overwhelming distress to the Earnhardt family." *Id.* The trial court also found that disclosure *of any sort* would be intrusive and violate the Earnhardt family's right to privacy. Mrs. Earnhardt testified that permitting inspection of the autopsy photographs alone would be "the most painful intrusion that there could be. It would cause emotional distress not only to myself, but permanent emotional damage to my children and the rest of my family." *See Earnhardt v. Volusia County*, trial testimony of Teresa Earnhardt. Disclosure of the autopsy photographs would be "humiliating, disgusting, negative. They could be nothing but harmful and painful to anyone involved in my family, my company, our fans, anyone." *Id.*

The appellate court held as to the fourth factor:

> The fourth factor also weighs in favour of nondisclosure. As we previously stated, the autopsy report and other information was made available to the public and, given the poor quality of the photographs and the fact that they were only made as a back-up to the medical examiner's dictation system, disclosure of the photographs would reveal nothing that is not contained in the autopsy records that were released.

Campus Communications, 821 So.2d at 402.

Florida's adoption of a limited, categorical exemption for autopsy photographs may well be of interest to this Court in its consideration of the post-mortem photographs of Vincent Foster at issue here. This Court has already held that "as a categorical matter ... a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no

'official information' about a Government agency, but merely records what the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *Reporter's Committee*, 489 U.S. at 780 (holding rap sheets warranted categorical exemption from the FOIA). In so holding, this Court indicated that the FOIA did not dictate a case-by-case balancing of interests, but rather "that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* at 776, citing *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Certainly, post-mortem photographs constitute a genus of records in which any FOIA balance would characteristically tip in favor of nondisclosure. Indeed, based upon the experiences[22] and precedents discussed herein, this Court would be justified in considering a categorical exemption from the FOIA for all post-mortem photographs.

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[22] Other families in recent years have also had to face the publication or possibility of publication of post-mortem photographs and video graphics of their loved ones. The family of journalist Daniel Pearl explained in a statement regarding the showing of the video of their son's murder, "it is beyond our comprehension that any mother, father or sister should have to relive this horrific tragedy ... " *See Pearl family anger at broadcast*, at http://news/bbc.co.us/1/hi/world/americas/1988828.stm. Similarly, the family of Laci Peterson expressed distress over leaks of the autopsy of their daughter and grandson. *See* Jim Wasserman, *Autopsy leak "devastates" Laci's family*, Monterey Herald, May 30, 2003, at http://www.montereyherald.com/mld/montereyherald/5971836.html. The dissemination and publication of post-mortem photographs is an unwarranted invasion of the privacy of such grieving families.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

I. STATES WITH SPECIFIC LAWS MAKING AUTOPSY PHOTOGRAPHS OR AUTOPSY REPORTS CONFIDENTIAL.

1. Alaska

ALASKA STAT. § 12.65.020 (2003) makes the reports of medical examiners "a privileged and confidential document." The statute provides that the report "may be disclosed to public officers and employees for a public purpose and, when doing so will not interfere with an ongoing investigation or prosecution, to a person who is related to the deceased or who has a financial or personal interest in the estate of the deceased person."

2. California

CAL. CIV. PROC. CODE § 129 (2003) forbids the copying of autopsy photographs, except for use in criminal proceedings or "except as a court of this state permits, by order after good cause has been shown."

3. Connecticut

CONN. GEN. STAT. § 19a-411(b) (2003) limits public access to reports of examinations by medical examiners. In *Galvin v. Freedom of Info. Comm'n*, 518 A.2d 64, 71 (Conn. 1986), the Connecticut Supreme Court upheld regulations under this statute that made autopsy reports entirely exempt from disclosure.

4. Delaware

DEL. CODE ANN. tit. 29, § 10002(d)(15) (2002) specifically exempts from public records "[a]ny photographs, video recordings or audio recordings of a postmortem examination in the possession of the office of the Chief Medical Examiner." This exemption was added by 73 Del. Laws c. 260 (effective May 17, 2002).

5. Florida

FLA. STAT. § 406.135 (2002) specifically exempts autopsy photographs, video and audio recordings from public access. This exemption was upheld by *Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), *rev. denied*, (Fla., July 1, 2003) (Table, Case No. SC02-1635).

6. Georgia

GA. CODE ANN. § 45-16-27(d) (2002) specifically exempts autopsy photographs from public disclosure. The statute allows continued access to law enforcement and prosecutors, for medical purposes (including medical education) and to family members. This exemption was added in 2002. 2002 Ga. Laws 667, § 1.

7. Indiana

IND. CODE ANN. § 36-2-14-10 (2003) makes photographs, video and audio recordings of autopsies confidential. The records are accessible to a surviving spouse, or if there is none to the parents or an adult child; to government agencies, provided that the identity of the deceased remains confidential unless necessary; or for coroner's

training. The section also allows a court to permit access on a showing of "good cause," for which the following standards apply: "(1) whether the disclosure is necessary for the public evaluation of governmental performance; (2) the seriousness of the intrusion into the family's right of privacy; (3) whether the disclosure of the photograph, video recording, or audio recording is by the least intrusive means available; and (4) the availability of similar information in other public records, regardless of form." This exemption was added by Indiana Public Law 271-2001, § 4 (effective July 1, 2001).

2003 Ind. HEA 1417, effective July 1, 2003, made minor amendments to IND. CODE ANN. § 36-2-14-10, allowing access for medical or pathological consultations, and requiring that identifying information be removed or masked for any release of autopsy photographs, video or audio recordings for training purposes.

8. Iowa

IOWA CODE § 22.7(41) (2003) provides that medical examiner reports, including autopsy reports, are confidential, and authorizes their release only to investigating law enforcement agencies and to the decedent's next of kin. This exemption was added by 2002 Iowa Acts ch. 1098, § 1 (approved April 9, 2002).

9. Louisiana

2001 La. Acts 117, effective August 15, 2001, created LA. REV. STAT. ANN. § 44.19, exempting autopsy photographs, video or audio records from public records. The statute authorizes release of the records only: (1) to family members

of the deceased; (2) to representatives of the estate; (3) to law enforcement for official use, or (4) if ordered by a court. The statute does not prevent the inspection of autopsy photographs or recordings.

10. Maine

ME. REV. STAT. ANN. tit. 22, § 3022(8) (2003) makes information in possession of the medical examiner confidential, including "[p]hotographs and transparencies, histological slides, videotapes and other like items relating to a medical examination case." This exemption was added by 2001 Me. Laws ch. 221, § 1. The confidential information may be released for law enforcement, medical or other official purposes, and by court order, and may be inspected and copied by family members or personal representatives. ME. REV. STAT. ANN. tit. 22, § 3022(12) & (13).

11. Maryland

Although, MD. CODE ANN., STATE GOV'T., § 10-617(b)(1) (2002) provides that autopsy reports are subject to public inspection, the Maryland Admin. Code provides that individual records other than the autopsy report, including photographs, are not public records but are considered private medical records. *See* MD. REGS. CODE 10.35.01.14(A).

12. Massachusetts

MASS. GEN. LAWS ANN. ch. 38, § 2 ¶ 8 (2003) provides autopsy reports "shall not be deemed to be public records"; authorizes the medical examiner to promulgate rules to govern limited disclosure, set forth in MASS. REGS. CODE tit. 505, ch. 1.00 (2003), and allows release of autopsy

reports to investigating agencies, family, and to parties in civil cases in certain circumstances. This exemption has been upheld by Massachusetts courts. *See Globe Newspaper Co. v. Chief Med. Examiner*, 533 N.E.2d 1356 (Mass. 1989).

13. Minnesota

MINN. STAT. § 13.83 (2002) divides data collected by medical examiners into public data (i.e. identification and cause of death) and investigative or nonpublic data, which is confidential. This includes autopsy photographs. Subdivisions 5 and 8 provide that this information may be released to investigatory agencies, to decedent's family or legal representative, and by court order. Under Subdivision 7, any person may petition a court for access, upon which the court can examine the data *in camera* and order disclosure "if it determines that disclosure would be in the public interest."

14. New Hampshire

N.H. REV. STAT. ANN. § 611-A:8(IV) (2002) provides that "autopsy reports are confidential medical records which shall not be released without the authorization of next of kin."

15. New Jersey

N.J. STAT. ANN. § 47:1A-1.1 (2003) states that government records subject to disclosure do not include "any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person,

taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy." Disclosure is allowed for use in criminal actions and proceedings, by court order on a showing of "good cause," for use in forensic or medical education, or for use by law enforcement agencies. This provision was added by 2001 N.J. Laws ch. 404, approved on January 8, 2002.

Even before adoption of the above provision, New Jersey courts had held that, while the state freedom of records act did allow access to autopsy reports, it did not allow release of or access to autopsy photographs. *See Shuttleworth v. City of Camden*, 610 A.2d 903, 914-15 (N.J. Super. Ct. App. Div. 1992) (holding that autopsy photographs were not public records).

16. New York

N.Y. COUNTY LAW § 677(3)(b) (McKinney 2003) provides that coroners' records, including autopsy reports, are open to inspection by the district attorney. The spouse, next of kin or personal representative may request copies of the autopsy report, and a court may order release of autopsy reports to persons affected by civil or criminal actions or others with a "substantial interest therein." New York courts have upheld this restriction on public access. *See, e.g., Taff v. County of Nassau*, 631 N.Y.S.2d 921 (N.Y.A.D. 2nd Dept. 1995), *leave to appeal denied*, 641 N.Y.S.2d 829, 664 N.E.2d 895 (N.Y. 1995).

N.Y. COUNTY LAW § 677 does not apply within the jurisdiction of New York City, but courts have declared that New York City Charter § 557(g) provides a similar limitation on public access. *See Mitchell v. Borakove*, 639 N.Y.S.2d 791,

793 (N.Y.A.D. 1st Dept. 1996), *appeal dismissed*, 646 N.Y.S.2d 987, 670 N.E.2d 228 (N.Y. 1996).

17. North Dakota

2003 N.D. Laws ch. 384, approved on April 9, 2003, creates a new section within N.D. CENT. CODE § 44-04, makes autopsy photographs, video or audio recordings confidential and allows their release only after redacting identifying information, and only for medical or scientific teaching purposes, for law enforcement training, and for publication in medical or scientific textbooks. Family members may view the autopsy information in the office of the medical examiner if there is not an ongoing criminal investigation.

18. Oklahoma

OKLA. STAT. tit. 51, § 24A.5(1)(d) (2002) provides that "confidential medical information" in the files of the Board of Medicolegal Investigations obtained during investigations should be kept confidential. OKLA. STAT. tit. 63, § 939 provides that the chief medical examiner shall produce records or documents only after a court order made upon showing of good cause. OKLA. STAT. tit. 51, § 945 provides that a copy of the autopsy report shall be forwarded to district attorneys and law enforcement personnel. OKLA. STAT. tit. 51, § 949(D) provides that autopsy reports may be furnished to next of kin upon request.

19. Rhode Island

R.I. GEN. LAWS § 23-3-1(11) (2002) defines "vital records" as "records of birth, death, fetal death . . . and data related to those records." R.I. GEN. LAWS § 23-3-23(a) likewise

prohibits the inspection, disclosure or copying of "information contained in vital statistics records" except as authorized in regulations. R.I. CODE R. 814.1 & 814.2 provide that autopsy reports and other reports of the medical examiner are confidential, and may be released only to the next of kin or personal representative, to the insurance company with permission of the next of kin, or to the treating physician.

20. South Carolina

S.C. CODE ANN. § 17-5-535(A) (2002), adopted by 2002 S.C. Acts 350 § 2, restricts access to autopsy photographs and videos to official personnel, the next of kin, and those authorized by court order or subpoena. This statute has been amended by 2003 S.C. Acts 34 § 1, to allow use of autopsy photographs and videos for legitimate medical, scientific, law enforcement or legal training or consultation and publication, provided that identifying information is redacted.

21. Texas

TEX GOV'T CODE § 552.101 (2003) exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. CODE CRIM. PROC. ANN. art. 49.25(11) (2003) provides that, while autopsy records and the autopsy report are subject to public disclosure, "a photograph or x-ray of a body taken during an autopsy is exempted from required public disclosure." This specific restriction was added by 1999 Tex. Gen. Laws, ch. 607, § 2, effective September. 1, 1999. *See* 2003 Op. Atty Gen. OR2003-1687

(Tex., March 13, 2003) (interpreting the new statutory exemption).

22. Utah

UTAH CODE ANN. § 26-4-17(4) (2003) provides that the medical examiner shall "maintain the confidentiality" of the records, including autopsy records, and provides for their release to the county or district attorney, the attorney general or other law enforcement officer with jurisdiction, and the next of kin of the deceased, their personal representative or attending physician. *See* 1988 Op. Atty Gen. 86-52 (Utah, May 9, 1988) (disclosure of autopsy records is limited to the statutorily created classes, and others identified in other statutes).

23. Washington

WASH. REV. CODE § 68.50.105 (2003) provides that reports and records of autopsies shall be confidential. The statute allows for provision of copies of the report to: family members and personal representatives of the deceased, attending physicians, prosecuting attorneys or investigating law enforcement agencies, public health officials and the department of labor and industries in some cases.

24. West Virginia

W. VA. CODE § 61-12-10 (2003) governs the release of autopsy records and reports, and provides that they may only be released: 1) to the prosecuting attorney or law enforcement personnel, 2) to any court of law or parties to a case where the death is a material issue, and 3) to certain state agencies when authorized by law.

II. STATES WHICH PROVIDE LIMITED ACCESS TO AUTOPSY RECORDS.

1. Arizona

Autopsy Reports.

ARIZ. REV. STAT. § 11-597 (2003), states that autopsy reports are to be kept in the files of the county medical examiner, and that they may be forwarded to the county attorney where the death occurred. No restriction on access has been provided by statute.

Public Records.

ARIZ. REV. STAT. § 39-121 states that "[p]ublic records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person." Arizona courts have found a strong presumption of openness for public records in the absence of specific exemptions. *See Carlson v. Pima County*, 687 P.2d 1242, 1246 (Ariz. 1984); *cf. Mitchell v. Superior Court*, 690 P.2d 51, 53 (Ariz. 1984) ("Our statutes also evince a legislative policy favoring disclosure, unless strong countervailing considerations exist.")

On this basis, a 1988 Opinion of the Arizona Attorney General stated that there was a presumption of openness for all autopsy records, but that, under certain circumstances, these records might be closed. 1988 Op. Atty Gen. 174 (Ariz., Dec. 30, 1988). Reasons for closing the records might include "countervailing interests of confidentiality, privacy or the best interests of the state," and would be resolved on a case-by-case basis. *Id.*, quoting *Carlson*, 687 P.2d at 1246.

2. Arkansas

ARK. CODE ANN. § 14-15-304(a) (2003) makes records gathered or created during death investigations confidential, "but only until such time that the coroner issues his final report."

ARK. CODE ANN. § 12-12-312(a)(1) states that records and files in possession of the state crime laboratory "shall be privileged and confidential," and may be released only if authorized by a court of competent jurisdiction, the prosecuting attorney or the public defender assigned to the case.

ARK. CODE ANN. § 25-19-105(b)(6) exempts records pertaining to criminal investigations from public access.

A series of attorney general opinions have held that this creates a limited confidentiality for these records, including autopsy records, but only so long as they are in the possession of the state crime laboratory, or if they are part of an ongoing criminal investigation. *See* 2001 Op. Atty Gen. 2001-100 (Ark., May 9, 2001); 1997 Op. Atty Gen. 97-294 (Ark., Sept. 25, 1997).

3. Colorado

COLO. REV. STAT. § 24-72-201 (2002) makes all public records open for inspection. However, COLO. REV. STAT. § 24-72-204(6)(a) provides that the custodian of the records may apply to the district court to have certain records closed if "disclosure of the contents of said record would do substantial injury to the public interest." Colorado courts have in the past made autopsy reports open to public inspection. *See Denver Publishing Co. v. Dreyfus*, 520 P.2d 104, 107-09 (Colo. 1974); *Freedom Newspapers, Inc. v.*

Bowerman, 739 P.2d 881, 883 (Colo. Ct. App. 1987). However, recently the public interest exception has been used to close autopsy records to the public. *See Bodelson v. Denver Post Corp.*, 5 P.3d 373, 378-79 (Colo. Ct. App. 2000) (justifying limitation of access to autopsy photographs of Colombine victims on public policy grounds). The *Bodelson* court also upheld consideration of the effects of release of autopsy records on the family members of the decedent. *Id.* at 380.

4. Hawaii

Disclosure of Autopsy Reports, OIP Op. Ltr. 91-32 (Haw., Dec. 31, 1991), held that access may be withheld pending completion of law enforcement investigations, but that afterwards autopsy reports should be made available. These reports do not include photographs.

5. Illinois

No statutes explicitly apply to autopsy records. 5 ILL. COMP. STAT. ANN. 140/7(1)(b) (West 2002) allows for exemptions from public access for records that would constitute a clearly unwarranted invasion of personal privacy. Likewise, 5 ILL. COMP. STAT. ANN. 140/7(1)(c) allows for the exemption of investigatory and ongoing law enforcement information.

6. Michigan

Although MICH. COMP. LAWS § 15.243(1)(a) (2003) provides an exemption from public records for "information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of

an individual's privacy," Michigan courts have held that this does not apply to autopsy reports because privacy rights do not survive death. *See Swickard v. Wayne County Med. Examiner*, 475 N.W.2d 304, 308-09 (Mich. 1991) (also rejecting a privacy claim by the decedent's family because an autopsy report does not include "private facts" about decedent). A recent case, *Mager v. Dept. of State Police*, 595 N.W.2d 142, 146 (Mich. 1999), suggested that in some cases, as perhaps for autopsy photographs, a court might find the release amounted to an intrusion of privacy. Information, according to the *Mager* court, is likely to be personal in nature "if it reveals intimate or embarrassing details of an individual's private life." *Id.* These two cases suggest that a Michigan court might be willing to balance privacy interests with the degree of disclosure or access requested.

MICH. COMP. LAWS § 15.243(1)(b) provides a further narrow exception to prevent disclosure of records that might interfere with law enforcement proceedings.

7. Mississippi

MISS. CODE ANN. § 41-61-65(1) (2003) provides that autopsy reports shall be issued to the following people: 1) the authorizing medical examiner; 2) the district attorney; 3) the court clerk; and 4) upon request to the immediate family of the deceased or legal representative or guardian of the deceased. No provision is made for release of these documents to any other person.

8. Missouri

MO. ANN. STAT. § 610.015 (2002) provides that public records "shall be open to the public for inspection and duplication." "Public record" is defined by MO. ANN. STAT. § 610.010(6) as "any record . . . retained by or of any public governmental body." Because MO. ANN. STAT. § 58.720.5 requires the medical examiner to retain copies of his files, the Missouri Attorney General has held that these records are public documents liable to inspection. *See* 1984 Op. Atty Gen. 11-84 (Mo., Apr. 12, 1984). More recently, Missouri courts have held that autopsy reports are not liable to release under the investigatory exception to the public records law created by MO. ANN. STAT. § 610.100.2. *See News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576, 579-80 (Mo. App. 1998) (holding that, for purposes of the public records laws, the medical examiner is a "law enforcement agency"). The implication of the investigatory exception recognized in *Cathcart*, however, is that such documents become open after completion of the investigation. *Id.* at 579 n.3; *cf.* MO. ANN. STAT. § 610.100.2 (investigative reports "are closed records until the investigation becomes inactive").

9. Montana

MONT. CODE ANN. § 46-4-123 (2002) requires preparation of an autopsy report and inclusion with the report of any death investigation. Montana has a constitutionally based right to public records, which is conditional "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." *See* MONT. CONST. art. II, § 9 (2002); *cf.* MONT. CODE ANN. § 1-6-102(3) (records "constitutionally protected from disclosure" removed from

public records law). Montana also has a strong constitutional right of privacy. *See* MONT. CONST. art. II, § 10.

Although no statute explicitly exempts autopsy records from disclosure, a Montana court would likely review the requested materials *in camera* and balance the demands of privacy against the public interest in disclosure. *See, e.g., Lincoln County Comm'n v. Nixon*, 968 P.2d 1141 (Mont. 1998) (where court authorized *in camera* review of criminal investigation documents to decide whether their release would impact privacy interests); *State v. Nelson*, 941 P.2d 441, 446-47 (Mont. 1997) (holding that the state must show a compelling interest to overcome a reasonable expectation of personal or informational privacy).

10. Nebraska

NEB. REV. STAT. § 84-712.05(5) (2002) allows for an exemption of "[r]ecords developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation. . . . " This provision would likely exempt autopsy reports at least during a pending investigation.

11. Nevada

An older attorney general opinion suggests that, while autopsy reports are public records within the meaning of NEV. REV. STAT. § 239.010 (the public records law), they are not automatically open to public inspection, but may be kept confidential to protect personal medical information. *See* 1982 Op. Atty Gen. 82-12 (Nev., June 15, 1982).

12. Ohio

OHIO REV. CODE ANN. § 313.10 (2003) makes all coroners' records public documents and guarantees access. *See State ex rel. Dayton Newspapers, Inc. v. Rauch*, 465 N.E.2d 458, 459-460 (Ohio 1984) (autopsy reports are public documents). However, access to these documents may be limited during investigations, including criminal proceedings. *Id.*

Ohio's privacy statute, OHIO REV. CODE ANN. § 1347.04(B) (2003) has been held not to limit the public's right to public records under OHIO REV. CODE ANN. § 149.43. *See State ex rel. Findlay Publ. Co. v. Schroeder*, 669 N.E.2d 835, 838 (Ohio 1996).

13. Oregon

OR. REV. STAT. § 146.035(5) (2001) provides limited access to autopsy records for the parents, spouse, children or personal representative of the deceased, as well as defendants who may be civilly or criminally liable for the death and their authorized representatives.

14. Pennsylvania

16 PA. STAT. ANN. § 1251 (2002) requires coroners to deposit official records and papers for the preceding year in the office of the prothonotary to allow public inspection. Pennsylvania courts have interpreted this requirement to mean that all coroners' documents, including autopsy reports, must be made available. *See In re Dillon*, 674 A.2d 735, 739 n.2 (Pa. Super. Ct. 1996). However, Pennsylvania courts have created a limited and temporary exception to

public access of autopsy reports during ongoing investigations. *See Com ex rel. Dist. Attorney of Blair County*, 823 A.2d 147, 16-17 (Pa. Super. Ct. 2003) (allowing the state to request a court to exempt autopsy reports from public disclosure where good cause is shown that release would impede an ongoing investigation).

15. South Dakota

S.D. CODIFIED LAWS § 1-27-1 (2003) requires that any public records must be kept available for public inspection. However, if the autopsy records relate to a potential criminal case, S.D. CODIFIED LAWS § 23-14-12 may keep the records confidential until an arrest is made. Reports, which must be filed by coroners with the bureau of criminal statistics are probably confidential under S.D. CODIFIED LAWS §§ 23-6-14 & 23-6-17. No cases have addressed release of autopsy photographs.

16. Tennessee

TENN CODE ANN. § 38-7-110(c) (2003) states that "the reports of the county medical examiners, toxicological reports and autopsy reports shall be public documents," and authorizes the department to make such documents available for a fee. However, this availability is subject to an exception in TENN CODE ANN. § 38-7-110(d) that, upon petition of the district attorney accompanied by affidavit from law enforcement officers, a court may order autopsy records to be confidential where release "may seriously impede or impair the investigation of a homicide or felony."

TENN CODE ANN. § 38-7-106(a) authorizes official autopsies only for cases "involving a homicide, a suspected homicide,

a suicide, a violent, unnatural or suspicious death." Where an autopsy is performed by request in other cases, Tennessee courts have found that the resulting autopsy reports, if not retained by the medical examiner, do not constitute public records subject to release. *See State ex rel. Cole v. Francisco*, 643 S.W.2d 105, 108-09 (Tenn. 1982) (records of private autopsy of Elvis Presley were not considered public documents).

17. Vermont

No statutes directly address access to autopsy records. VT. STAT. ANN. tit. 1, § 317(c) (2003) provides exemptions from the right of public inspection and copying. Several exemptions may be relevant. *E.g.*, VT. STAT. ANN. tit. 1, § 317(c)(2) ("records which by law may only be disclosed to specifically designated persons"); (c)(7) ("personal documents relating to an individual, including . . . information in any files relating to personal finances, medical or psychological facts concerning any individual"). VT. STAT. ANN. tit. 18, § 5205(f) states specifically that the autopsy report shall be submitted by the chief medical examiner to the "state attorney and the attorney general."

18. Virginia.

VA. CODE ANN. § 32.1-285 (2003) provides for the preparation of an autopsy report by the medical examiner, and filed with the office of the chief medical examiner, and a copy provided if a judge or attorney for the commonwealth requests the report. VA. CODE ANN. §§ 2.2-3704 makes access to all public records official state policy. Limited exceptions to the state freedom of information act are provided by VA. CODE ANN. §§ 2.2-3705 and 2.2-3706.G.1

for investigative records and certain medical records (including those which might jeopardize the privacy of any person), but no statute specifically addresses the release of autopsy records. Although death certificates themselves are confidential under VA. CODE ANN. §§ 32.1-271(A), which make these vital records, this confidentiality would not necessarily apply to the autopsy reports prepared under other statutes. *See Comment on Cause of Death of Decedent Prior to Filing Certificate of Death*, 1984-85 Op. Atty. Gen. 170 (Va., Mar. 21, 1985).

19. Wisconsin

WIS. STAT. § 19.35(1)(a) (2002) provides that, "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." The statute provides for an exception for records collected or maintained in connection with investigations. In *Journal/Sentinel, Inc. v. Aagerup*, 429 N.W.2d 772, 774-75 (Wis. Ct. App. 1988), the court of appeals used a balancing test to determine whether an autopsy report should be released, weighing the public interest in disclosure against the harm that might be caused to an ongoing criminal investigation. The court in *Aagerup* upheld the withholding of an autopsy report in that case where it was relevant to the investigation of a murder. Assembly Bill 604, introduced in the 2001 legislative session, would have made autopsy reports confidential, but failed to pass under relevant rules.

III. STATES WHICH MAKE AUTOPSY RECORDS OPEN.

1. Alabama

ALA. CODE § 36-18-2 (2003) provides that "the director [of forensic sciences] shall keep photographed or microphotographed reproductions of original reports of all investigations that he conducts in his office. Reproductions of such materials shall be public records and shall be open to public inspection at all reasonable times." *But see Stone v. Consol. Publ'g Co.*, 404 So.2d 678, 681 (Ala. 1981) (suggesting that courts may close records on the basis of public interest).

2. Idaho

No statutes address autopsy records specifically. IDAHO CODE §§ 9-335 and 9-340C (2002) contain no specific exemption for autopsy records from the state open records law. IDAHO CODE § 9-335(1) does exempt investigatory records compiled "for law enforcement purposes by a law enforcement agency," including confidentiality requirements for records that might "constitute an unwarranted invasion of personal privacy." IDAHO CODE § 9-340(4) permits limited confidentiality for records "of a personal nature," but limits this exemption to a list of financial records and vital statistics. *Stattner v. City of Caldwell*, 727 P.2d 1142, 1144 (Idaho 1986), confirmed that coroner's inquests are public hearings and their results are a matter of public record, including most medical test results.

3. Kansas

Autopsy Reports.

KAN. STAT. ANN. § 22a-233(c) (2002) requires that, "[a] full record and report of the facts developed by the autopsy

and findings of the pathologist performing such autopsy shall be promptly made and filed with the coroner and with the clerk of the district court of the county where the decedent died."

Public Records.

KAN. STAT. ANN. § 45-216(a) states that it is the "public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

In *Burroughs v. Thomas*, 937 P.2d 12, 15 (Kan. App. 1997), the Kansas court of appeals held that autopsy reports were public records and that they were not exempt from disclosure. The court noted that privacy rights in Kansas were not enjoyed by the deceased, but did not consider whether any relational right of privacy might exist on the part of family members which could justify an exemption under KAN. STAT. ANN. § 45-221(a)(30), which allows agencies to exempt records the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." The court noted that the exemption "does not apply here." *Burroughs*, 937 P.2d at 15.

4. Kentucky

Under Kentucky's Open Records Law, KY. REV. STAT. § 61.872(1) (2002), "[a]ll public records shall be open for inspection by any person, except as otherwise provided by [the Act]." This applies to any document in the possession of any public agency, including every state or local government officer. *See* KY. REV. STAT. § 61.870(1) & (2). KY. REV. STAT. § 61.878(1)(h) creates a limited exception for law enforcement records, but these records are open after

adjudication or a decision is made to take no action. An opinion of the Kentucky attorney general held that coroner's reports and autopsy reports were such investigatory reports and were exempt from disclosure until prosecution was completed or a decision was made not to prosecute. *See* Opinion Atty Gen. 82-458 (Ky. 1982).

Although there is an exception for release of records "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy," KY. REV. STAT. § 61.878(1)(a), the Kentucky attorney general has opined that this protection does not survive death. *See* Opinion Atty Gen. 92-94 (Ky. 1992); 88-2 (Ky. 1988).

There have been recent unsuccessful attempts to exempt autopsy photographs from disclosure. Kentucky House Bills 77 and 582 were introduced during the 2002 regular session. Both bills would have prohibited public access to autopsy photographs, video or audio recordings, except to family members, personal representatives, for law enforcement purposes, or as directed by court order. Both bills would have permitted simple inspection of these autopsy records. HB 582 died in committee, but HB 77 was passed by the Kentucky House of Representatives, only to die in the Senate. No bills relating to autopsy photographs were introduced during the 2003 session, nor have any been pre-filed for the 2004 regular session.

5. North Carolina

N.C. GEN. STAT. § 130A-389(a) (2002) provides that copies of autopsy reports "shall be furnished to the authorizing medical examiner, district attorney or superior court

judge. A copy of the report shall be furnished to other persons upon request."

HB 645, which is currently before the North Carolina Senate, would specifically exempt autopsy photographs, video and audio recordings from the public records law. The bill would allow anyone to inspect the autopsy records, and would authorize their release to medical examiners, the district attorney, superior court judge or law enforcement personnel. Personal representatives of the deceased could obtain copies, and redacted copies might be made available for medical, scientific, law enforcement or legal training purposes and publication. A court could authorize access upon a showing of good cause.

6. New Mexico

No statutes specifically address autopsy records. N.M. STAT. ANN. § 14-2-1.A (2002) authorizes public access to all official records, with very limited exceptions, including one for ongoing investigations by law enforcement. New Mexico courts have held that the right of public access is a "fundamental right" and must be founded on a specific statutory exception. *See State ex rel. Newsome v. Alarid*, 568 P.2d 1236, 1244 (N.M. 1977).

7. Wyoming

WYO. STAT. ANN. § 16-4-203(d)(i) (2003) provides that the custodian shall "deny the right of inspection of the following records, unless otherwise provided by law: (i) Medical, psychological and sociological data on individual persons, *exclusive of coroners' autopsy reports*." [emphasis added].